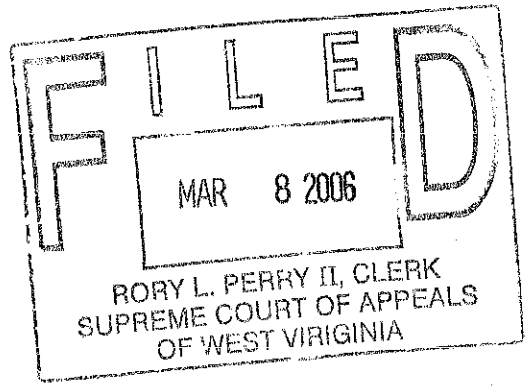
**APPEALED FROM THE DECION FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA, NOW IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**




**SAMANTHA SELLS,**

**PLAINTIFF/APPELLANT,**

**V.**

**CIVIL ACTION NO.: 02-C-165-F**
**(Circuit Court of Mercer County, WV)**

**ARNOLD RAY THOMAS,**
**KENNETH E, CHITTUM, and**
**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**
**DEFENDANTS/APPELLEES.**

# DEFENDANT KENNETH E. CHITTUM'S RESPONSE TO SAMANTHA SELLS' BRIEF IN SUPPORT OF APPEAL

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DEFENDANT.

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## TABLE OF AUTHORITIES


Better Homes Inc. v. Rodgers, 195 F.Supp. 93 (N.D. W.Va. 1961).

Birnholz v. Blake, 399 So. 2d 375 (Fla. App. 1981).

Bourke v. Warren, 118 Mich. App. 694, 325 N.W.2d 541 (1982).

Espinoza v. Thomas, 472 N.W.2d 16 (Mich. Ct. App. 1982).

Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

Goff v. Justice, 120 S.W.3d 716 (Ky. Ct. App. 2003).

Hicks ex. rel. Saus v. Jones, 617 S.E.2d 457 (W.Va. 2005).

Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (1990).

Kirk v. Watts, 62 S.W.3d 37 (Ky. Ct. App. 2001).

Kronjaeger v. Buckeye Union Ins. Co., 200 W.Va. 570, 490 S.E.2d 657 (1997).

McCarthy v. Pedersen & Houpt, 2150 Ill. App. 3d 166, 621 N.E.2d 97.

Muhammad v. Strassburger, McKenna, Messer, Shilobad & Gutnick, 587 A.2d 1346, Cert. denied, 502 U.S. 867 (Pa. 1991).

Rogers v. Norville, 174 Ga. App. 453, 330 S.E.2d 392 (1985).

Schulte v. Burch, 151 Ill. App. 3d 322, 502 N.E.2d 856 (1986).

West Virginia Rules of Civil Procedure Rule 56(b)

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**IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA**

**SAMANTHA SELLS,** **PLAINTIFF,**

**v.** **Civil Action No: 02-C-165-F**

**ARNOLD RAY THOMAS,**
**KENNETH E. CHITTUM, and**
**STATE FARM MUTUAL AUTOMOBILE**
**INSURANCE COMPANY,** **DEFENDANTS.**

**KENNETH E. CHITTUM'S RESPONSE TO SAMANTHA SELLS', BRIEF IN SUPPORT OF APPEAL**

**I. Kind of Proceeding and Nature of the Ruling Below**

On or about February 4, 2005, Defendant, Kenneth E. Chittum, by and through his counsel, filed a motion for summary judgment in the Circuit Court of Mercer County, West Virginia. On the 25th day of April 2005, the matter went before the Court for a hearing on the Motion for Summary Judgment. The parties agreed at that time that the matter would be determined based upon the memoranda submitted by the parties.

The Court in its Order dated May 11th, 2005, the Court provided, "...this Court agrees with the majority of jurisdictions that in a legal malpractice action, the plaintiff has the burden of proving both his loss and its causal connection beyond speculation. In the case at bar, the Plaintiff settled for $50,000.00 under a policy with a limit of $75,000.00. It is beyond the province of this Court to speculate that a jury would have awarded the Plaintiff the policy limits. Accordingly, this Court finds that the Defendant is entitled [to] judgment as a matter of law." Order Page 7 **(Exhibit 1).**

Samantha Sells, by and through her counsel, admits in her brief, "The Court found that any arguable negligence on the part of Chittum ***was not the proximate cause of loss to Samantha Sells [emphasis added].***" Sells Brief Page 1.

**II. Statement of the Case/Findings of Fact**

On April 21, 2000, the Plaintiff, Samantha Sells, was a guest passenger on a 1991 Suzuki motorcycle driven by Billy Ray Lewis, Jr., traveling west on U.S. Route 102, in or near Wolfe, Mercer County, West Virginia. The motorcycle was involved in an accident with a Ford F-150 pick-up truck operated by Arnold Ray Thomas. As a result of the accident, the Plaintiff suffered serious injuries.

Thereafter, the Plaintiff, Samantha Sells, retained the Defendant, Kenneth E. Chittum, to represent her for her claims against Mr. Lewis and Mr. Thomas and to allow him to deal with the insurance companies on her behalf. As a result of the Defendant, Kenneth E. Chittum's, negotiations, the Defendant recovered a sum of twenty four thousand three hundred dollars ($24,300.00) from Nationwide Insurance Company **(Exhibit 2 and 3)** to compensate the Plaintiff for her injuries. The sum collected by the Defendant, Kenneth E. Chittum, represented the remaining balance of Arnold Ray Thomas' policy limits. The Defendant, Kenneth E. Chittum, also received a check from State Farm Insurance Company for med-pay benefits from a policy belonging to the Plaintiff's parents **(Exhibit 4).** On January 23, 2001, the Plaintiff completed a settlement with Arnold Ray Thomas' liability insurer, Nationwide Insurance Company. Thereafter, on February 6, 2002, the Plaintiff terminated her representation by the Defendant, Kenneth E. Chittum, **(Exhibit 5)** and prior to the Statute of

Limitations Expiring, retained the Plaintiff's current counsel, Frank Venezia, Esq., to represent her.

The Plaintiff instituted the claim against the Defendant Chittum for professional negligence in failing to investigate and determine whether the Plaintiff was eligible for underinsured motorist benefits under her parent's policy.

## CONCLUSIONS OF LAW BY THE LOWER COURT

The Plaintiff/Appellant, Samantha Sells, in her brief argues the conclusions of law provided by the Lower Court in part and parcel. The Defendant, Kenneth E. Chittum, urges this Honorable Court to read the entirety of the opinion in order to get a full understanding of the Lower Court's decision and rationale.

The Court provided in the Order dated, May 11th, 2005, "In the seminal case concerning legal malpractice, Syl. Pt. 1, Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (1990), the West Virginia Supreme Court of Appeals set forth the standard by which a legal malpractice claim is reviewed:

> An attorney who undertakes to perform professional services for a client is required to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances.

The Court in Keister also set forth the test for actionable legal malpractice as follows:

In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.

Id. at 748. The Court will first address the third element.

(3) That such negligence resulted in and was the proximate cause of loss to the client.

The Defendant asserts that the Plaintiff can not show that the actions of the Defendant are the proximate cause of the loss because the Plaintiff prevailed in her underinsured claim in this action.

The Plaintiff argues that several months after State Farm raised the issue of residence in its Answer to the Complaint, Erica Hensley of State Farm underwriting sent a letter to Samantha's father stating that Samantha was insured on the date of the wreck. The Plaintiff asserts that she ***should*** have been able to collect the policy limit of $75,000.00, but due to the inaction of the Defendant Chittum, she settled for $50,000.00. Therefore, the Plaintiff asserts, summary judgment should be denied because it is a question of fact as to whether the Defendant's inaction proximately caused her damages of not receiving the policy limits from the underinsured coverage.

The West Virginia Supreme Court of Appeals set [held] for the law concerning the burden of proof on damages in a legal malpractice action as follows: "Damages arising from the negligence of an attorney are not presumed, and a plaintiff in a malpractice action has the burden of proving both his loss and its causal connection to the attorney's negligence." Keister, 182 W.Va. 745, 391 S.E.2d 895 at Syl. Pt. 3

Although this Court's research has not revealed any West Virginia Supreme Court of Appeals decisions on point, decisions on this issue from the majority of jurisdictions suggest that the ***Plaintiff can not show that the Defendant's inaction was the proximate cause of a loss [emphasis added]***. For example, in Birnholz v. Blake, 399 So. 2d 375 (Fla. App. 1981), the Florida Appellate Court found that in a legal malpractice action for failure to prosecute a case, where some of this client's claims against the defendant in the underlying case were still

viable and pending in section litigation, the client may never suffer any damage caused by the attorney's negligence.

Additionally, in Rogers v. Norville, 174 Ga. App. 453, 330 S.E.2d 392 (1985), the Georgia Appellate Court found that the failure of the defendant's attorneys to file action within the period set by state statute did not bar action against the tortfeasor's estate and a viable claim remained against the tortfeasor's insurance company. Accordingly, the Court in *Rogers* determined that the legal malpractice could not be maintained because the underlying claim remained viable.

In Schulte v. Burch, 151 Ill App. 3d 322, 502 N.E.2d 856 (1986), the Illinois Appellate Court found that the cause of action against the attorney was premature as the client still had a viable cause of action on surety bond for materials furnished to the subcontractor.

...In the case at bar, it is not disputed that the tortfeasor's policy limits were exhausted in the underlying action. Therefore, pursuant to the law set forth in Kronjaeger, the ***underinsured carrier*** ***[emphasis added]*** would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage. Syl. Pt. 7, Kronjaeger v. Buckeye Union Ins. Co., 200 W.Va. 570, 490 S.E.2d 657 (1997). Accordingly, this does not appear to be a situation where the plaintiff was forced to settle, and it is very speculative as to whether the Defendant proximately caused loss for the Plaintiff.

The Court also finds the Michigan decision, Bourke v. Warren, 118 Mich. App. 694, 325 N.W.2d 541 (1982), very persuasive on this issue. In *Bourke*, the plaintiffs filed a legal malpractice action against their former attorney because he allowed the statute to expire. In

the underlying action, the plaintiff's suffered property damage after a truck struck their building and the statute expired before the claim was filed. The plaintiff obtained a second attorney and sued the company which owned the truck, the company's insurance carrier, and the plaintiff's insurance carrier. The company's insurance carrier was eventually dismissed because the action was started beyond the period of limitation. However, the plaintiff's insurance carrier remained in the litigation, which resulted in a verdict for the plaintiff's in the amount of $800.00. In the legal malpractice action, the trial court granted summary judgment, finding that the defendant was entitled to judgment as a matter of law because the plaintiff could not prove the existence and extent of the injury. Id.

Although the existence and extent of injury is not the exact same language used in the elements of a legal malpractice action in West Virginia, this Court believes that the Plaintiff in the case at bar is required to "prove her loss" beyond the speculative assertions provided herein. Accordingly, this Court agrees with the majority of jurisdictions that in a legal malpractice action, the plaintiff has the burden of proving both his loss and its causal connection beyond speculation. In the case at bar, the Plaintiff settled for $50,000.00 under a policy with a limit of $75,000.00. It is beyond the province of this Court to speculate that a jury would have awarded the Plaintiff the policy limits. Accordingly, this Court finds that the Defendant is entitled to judgment as a matter of law."

## ANALYSIS

### III. Assignment of Error Relied Upon: Ruling by the Lower Court

**A. The Circuit Court did not err when it found that the Plaintiff-Respondent was not forced to settle because it was not disputed that the tortfeasor's policy limits were exhausted in the underlying action, and that the underinsured carrier**

would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage.

B. The Circuit Court did not err when it found that damages resulting from the alleged malpractice in this case were too speculative to establish a causal connection between the acts and omissions of the Defendant-Respondent and those damages.

C. The Circuit Court did not err when it did not allow further discovery in the matter before it granted the Defendant-Respondent's motion for summary judgment.

## V. STANDARD OF REVIEW/DISCUSSION OF LAW

In Syl. Pt. 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997), the court held, "although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, includes those facts which the circuit court finds relevant, determinative of the issues and undisputed."

The eight (8) page Order granting the Defendant's Motion for Summary Judgment set out the facts that have been quoted in both the Appellant's Brief and the Appellee's Brief almost verbatim. The facts the Court relied upon are clearly stated and are sufficient to allow for meaningful appellate review and are not at issue.

In Hicks ex. rel. Saus v. Jones, 617 S.E.2d 457 (W.Va. 2005), the court provided, "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law."

The Lower Court was very clear on this issue. The Court held, "It is beyond the province of this Court to speculate that a jury would have awarded the Plaintiff the policy limits.

Accordingly, this Court finds that the Defendant is entitled [to] judgment as a matter of law." Order Page 7.

Further, the Plaintiff/Appellant had the opportunity to develop her case and failed to do so. There are no genuine issues of material fact for the trier of fact to settle.

Rule 56(b) of the West Virginia Rules of Civil Procedure provides, "A party against whom a claim, counterclaim, or cross-claim is asserted or a declatory judgment is sought may, at any time, move with or without supporting for a summary judgment in the party's favor as to all or any part thereof."

The Defendant moved for summary judgment after many depositions had been taken including that of the Plaintiff/Appellant. The Court had the facts in this case before it which the Plaintiff/Appellant did not dispute and were quoted almost verbatim in the Plaintiff/Appellant's Petition for Appeal or in her Brief. The Court properly granted the Defendant/Appellee's motion for summary judgment as there are no genuine issues of material fact.

The Court properly granted the Defendant's Motion for Summary Judgment.

**A. <u>The Circuit Court did not err when it found that the Plaintiff-Respondent was not forced to settle because it was not disputed that the tortfeasor's policy limits were exhausted in the underlying action, and that the underinsured carrier would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage.</u>**

The Court's discussion in the Order Granting Summary Judgment is clear.

The Court in its Order provided, "Although the existence and extent of injury is not the exact same language used in the elements of a legal malpractice action in West Virginia, this Court believes that the Plaintiff in the case at bar is required to "prove her loss" beyond the speculative assertions provided herein. Accordingly, this Court agrees with the majority of jurisdictions that in a legal malpractice action, the plaintiff has the burden of proving both his loss and its causal connection beyond speculation. In the case at bar, the Plaintiff settled for

$50,000.00 under a policy with a limit of $75,000.00. It is beyond the province of this Court to speculate that a jury would have awarded the Plaintiff the policy limits. Accordingly, this Court finds that the Defendant is entitled to judgment as a matter of law."

The Defendant/Appellee did not force Samantha Sells to settle her claim. On February 6, 2002, Samantha Sells signed a release for the settlement proceeds for her claim for personal injuries. **(Exhibit 6)**. In the release, in bold print, in big letters, it plainly urges her to seek legal counsel prior to the running of the statute of limitations for any other claims that she may have. Ms. Sells hired Frank Venezia, Esq., to pursue her claim prior to the running of the statute of limitations on her personal injury claim but he failed to do so. Thus he filed a malpractice claim against the Defendant and the claim was dismissed on Defendant's Motion for Summary Judgment after approximately three years.

Further, the cases that were cited by the Plaintiff/Appellant are not binding on the Court in West Virginia and the cases are not based on West Virginia law.

The Plaintiff/Appellant argues in her brief, "As the Circuit Court noted in the present case concerning *Goff v. Justice*, there is a difference between electing to settle and being forced to settle the underlying claim. (Order at 6). Samantha Sells falls into the latter category. The deprivation of a fair hearing is precisely the situation in the case before this Court. Samantha Sells suffered lost opportunities and was forced to settle her case." (Plaintiff/Appellant Brief at 9). There was no deprivation of a fair hearing in this case. Samantha Sells brought the current action and had her day in Court. The Court Granted the Motion for Summary Judgment in favor of Kenneth Chittum. Further, the Plaintiff/Appellant did not have to settle her claim. She could have refused to sign the release provided to her by the Defendant/Appellee and refused to cash the check that was provided to her. However, she

signed the release and she cashed the check from the settlement proceeds. The facts are undisputed that Samantha Sells was offered $50,000.00 to settle her claim. She settled her claim for that amount and signed a release and cashed the check. On the release, in large letters it urges her to seek advice from another attorney in order to protect any further claims that she may have related to her personal injuries. She in fact did hire Frank Venezia, Esq. prior to the Statute of Limitations expiring to protect her interests.

The Plaintiff/Appellant argues a trilogy of cases including *Espinoza v. Thomas*, *Wassall v. DeCaro and Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick* in her brief. All of these cases turn on a simple point wherein Ms. Sells would have been forced to settle her claims in order for these cases to be applicable. In the case at bar, these cases are not applicable and are not binding on the Courts of West Virginia. Further, Ms. Sells was not forced to settle her claim. She voluntarily settled her claim and signed a release and terminated the employment of Mr. Chittum. On the release, in large letters, the language was present urging her to contact another attorney in order to preserve any rights she had related to the underlying personal injury claim. She in fact did hire counsel, Frank Venezia, Esq., prior to the running of the Statute of Limitations and could have pursued any and all claims that she may have had related to the personal injury claim.

Sells further argues, "Of course, appellant's present counsel strenuously argued that West Virginia law should apply given the facts of the case. At the hearing on State Farm's summary judgment motion, however, the judge originally assigned to this case stated, and counsel was compelled to concede, that State Farm's motion should be granted if Virginia law was to be applied in this case. The trial court deferred ruling on State Farm's summary

judgment ruling until a further date. Ms. Sells settled with State Farm before the motion was ruled upon. As a result, Ms. Sells was indeed forced to settle her case. Otherwise, she ran the serious risk of an adverse ruling from the court on State Farm's summary judgment motion, resulting in no coverage for her injuries." (Plaintiff/Appellant's Brief at 12).

Samantha Sells was not forced to settle her claims. Samantha Sells weighed the risk of the Court Granting State Farm's Motion for Summary Judgment and settled her claim as evidenced by her signing the applicable releases and cashing the checks. Any individual that seeks relief in the Court system takes chances to litigate their case. In the current matter, Samantha Sells had the opportunity to litigate her claim against Kenneth Chittum, Esq. and the Court Granted his Motion for Summary Judgment. There is no issue related to the personal injury claim that Ms. Sells suffered because she terminated the employment of Kenneth Chittum, Esq. and hired Frank Venezia, Esq. before her claim would have been barred due to the running of the Statue of Limitations.

Samantha Sells further argues, "In the present case, an opportunity was lost and Ms. Sells was denied a fair adjudication by the appellee's negligent handling of her case – specifically his aforesaid breach of the consent to settle, exhaustion, and subrogation clauses." (Plaintiff/Appellant's Brief Page 13). This is without merit and there is no evidence to support her argument. The facts are what the facts are and the lower court has properly ruled and granted the Motion for Summary Judgment. Ms. Sells fired Kenneth Chittum, Esq. after she consented to the settlement as evidenced by the release that she signed and the checks that she cashed. Mr. Chittum encouraged Ms. Sells to seek advice of another attorney in order to protect any remaining rights she had prior to the running of the statute of limitations. She was

told in writing, as evidenced by the large print on the release that she signed to seek the advice of an attorney to protect any further rights she may have regarding the personal injuries that she suffered in this matter. The sole matter that relates to Mr. Chittum is whether or not he committed professional negligence, which he did not.

**B . <u>The Circuit Court did not err when it found that damages resulting from the alleged malpractice in this case were too speculative to establish a causal connection between the acts and omissions of the Defendant-Respondent and those damages.</u>**

The Court in its Order provided, "Although the existence and extent of injury is not the exact same language used in the elements of a legal malpractice action in West Virginia, this Court believes that the Plaintiff in the case at bar is required to "prove her loss" beyond the speculative assertions provided herein. Accordingly, this Court agrees with the majority of jurisdictions that in a legal malpractice action, the plaintiff has the burden of proving both his loss and its causal connection beyond speculation. In the case at bar, the Plaintiff settled for $50,000.00 under a policy with a limit of $75,000.00. It is beyond the province of this Court to speculate that a jury would have awarded the Plaintiff the policy limits."

The Court was within its right not to speculate about the damages that a jury might award. The Plaintiff/Appellant argues in her brief, <u>Better Homes Inc. v. Rodgers</u>, 195 F. Supp. 93 (N.D. W.Va. 1961) rationale wherein the plaintiff's former attorneys, who lost a property damage negligence case brought by a customer and failed to appeal within the applicable time period." Appellant Brief Pages 13-14. The case before the Court is distinguishable from the *<u>Rodgers</u>* case because there is no issue concerning property damage negligence nor is there a question concerning a failure to appeal a judgment. It is further distinguishable because this involves a settlement and not a case that had been adjudicated.

The undisputed facts in this case that have been quoted by the parties clearly show that Samantha Sells signed a release when she settled her claim. In the release, the language contained therein urged her to seek legal counsel to protect any and all claims that she may have prior to the running of the statute of limitations. Ms. Sells fired the Defendant and hired

Frank Venezia to represent her prior to the running of the statute of limitations. The amount of money that Ms. Sells received was more than her medical bills of approximately $35,000.00. If she did not feel that the amount in question was adequate, she could have refused to sign the settlement agreement, fired the defendant and proceeded with another attorney to try to collect additional funds for her injuries.

The Plaintiff/Appellant further argues,

"If it should be the law that the necessity of undertaking the functions of the Supreme Court of Appeals, in the limited sense hereinbefore outlined, renders the proof of damages too remote, speculative and uncertain to receive cognizance, it is apparent that no lawyer can ever be held financially responsible for admitted negligence in failing to perfect an appeal from a judgment adverse to his client. I do not believe that this is or should be the law. The integrity of the Bar as an essential part of our judicial system is too important to permit its reputation to be impugned by a justifiable charge that its members are free of obligation to respond in damages for breach of the ordinary standards of due care, simply because the damages are difficult of ascertainment." Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W.Va. 1961).

Defendant Chittum did not admit negligence and negligence in this matter was never proven. Defendant Chittum did respond to any and all actions against him and the Circuit Court Granted his Motion for Summary Judgment against this Plaintiff/Appellant.

"That the "speculative nature" of the damages is no defense to a negligent lawyer whose client has lost the opportunity to have his claim adjudicated by a court and jury because of his failure to file suit within the statutory period, or to take necessary steps property to mature and present his suit, seems to be the majority rule. The better reasoned opinions hold that client is entitled to his day in court and to damages, which include the value of his lost claim, even though the ascertainment of those damages involved in an adjudication, in the subsequent suit between client and lawyer, of the issues which would have been tried in the first suit, had it been properly filed and prosecuted. The courts recognize the difficulties inherent in trying these issues in a suite in which the claimed debtor is not a party, and in which the evidence which he might have presented may not be available to the lawyer as a defendant, but, on balancing the interest, place this burden on the defendant lawyer rather than leave the innocent to bear the loss of his unlitigated claims." Better Homes, Inc. v. Rodgers, 195 F.Supp. 93 (N.D.W.Va. 1961).

The Plaintiff/Appellant did not and could not prove that the Defendant Chittum was negligent. The Plaintiff/Appellant terminated the employment of Defendant Chittum prior to the running of the Statute of Limitations. She hired Frank Venezia, Esq. prior to the Statute of Limitations running on this matter and she could have protected any and all rights that she may have had regarding this claim. The current case at bar is distinguishable from *Better Homes* because *Better Homes* dealt with a debtors claim and the case before the Court deals with the issue of malpractice on behalf of a lawyer. There is no evidence to support the Plaintiff/Appellant's position that should this matter be Denied that her claims would go unlitigated. The claim for malpractice against Mr. Chittum has been litigated and the Circuit Court Granted Summary Judgment.

The Plaintiff/Appellant in her brief cites a case entitled, "McCarthy v. Pedersen & Houpt, 2150 Ill. App. 3d 166, 621 N.E.2d 97, appeal denied, 153 Ill. 2d 561, 624 N.E.2d 809 (1993)." Appellant Brief Page 15. This case is not binding on the Court in West Virginia. It is not statutory or case law within the State of West Virginia, or the Fourth Circuit of Appeals. Further the McCarthy case is about failure to file a timely claim under a specified federal statute and selection of an unqualified expert. The case at bar has absolutely nothing to do with the failure to file a timely claim. Ms. Sells fired the Defendant prior to the running of the statute of limitations on any and all claims related to her personal injury. She signed a release that clearly advises her to seek legal assistance from another attorney prior to the running of the statute of limitations. Ms. Sells did in fact hire Frank Venezia and could have protected any and all interests that she had prior to the running of the statute of limitations. Further, the

case at bar is a State claim not a Federal claim and it has nothing to do with experts or their qualifications.

The Plaintiff/Appellant further argues,

"In *Goff*, the plaintiffs settled their underlying medical malpractice action ***after*** [***emphasis added***] replacing their attorney, and the court held, in reversing a judgment for the former attorney in their legal malpractice action:

In the current case at bar, Sells fired Kenneth E. Chittum, Esq. and hired Frank Venezia, Esq. prior to the running of the Statute of Limitations. Sells by and through her counsel could have protected any rights that she had remaining, related to the personal injuries that she sustained in this accident, but failed to do so.

"As is clear from our holding in the *Kirk* case, the mere fact that Goff reached a settlement on her underlying medical malpractice claim against Dr. McCoy does not mean that she forfeited her right to pursue a legal malpractice claim against the appellees. As in the *Kirk* case, we consider the position in which the Goffs had been placed by the appellees. Because of the alleged negligent actions of Justice, the Goffs were limited in the presentation of evidence against Dr. McCoy. In short, we conclude that the Goffs' legal malpractice claim against the appellees remained alive even after her settlement with Dr. McCoy." 120 S.W.3d at 723. The *Goff* court followed Kirk v. Watts, 62 S.W.3d 37 (Ky. Ct. App. 2001), and summarized the holding of that case as follows:

"The Court noted the factual differences between *Kirk*'s claim and the *Mitchell* case. The court noted that the Mitchells lost nothing as a result of their attorney's malpractice because they are able to maintain an action in federal court. The court distinguished *Kirk*'s claim because *Kirk* lost the opportunity to maintain the case in her own name and to prosecute her own interests as a result of Watts' advice not to list the claim on the bankruptcy petition." 120 S.W.3d at 723.

The case at bar is a professional negligence case against Kenneth E. Chittum, Esq. Sells had the opportunity to prosecute her case after she terminated the employment of Chittum but failed to do so. She hired counsel, Frank Venezia, Esq. who could have protected any and all rights that she had remaining related to the personal injuries that she sustained in this

accident. The current case at bar is distinguishable because it does not involved a bankruptcy petition nor does it involve anything to do with a creditor. Ms. Sells was specifically advised to seek legal advice from another attorney to protect any and all remaining rights that she may have had related to the said personal injuries as evidenced by the signed release that she signed when she settled her claim and terminated the employment of Mr. Chittum.

"Perhaps the best explanation of the nature of speculative damages in the legal malpractice arena is expressed as follows:

"In a legal malpractice action, a court may be tempted to characterize the plaintiff's damage claim as speculative, because of the difficulty in liquidating the claim. This is because legal malpractice litigation often involves hypothetical questions that have real consequences. For example, how much did the client lose, because a lawsuit was not prosecuted? Or, how much better off would the client have been had the suit been defended or been defended more competently?

Often, no one can say precisely what the plaintiff lost or should have lost, but difficulty or imprecision in calculating damages does not exculpate an attorney. Although damages cannot be calculated precisely, depending on the circumstances, they can be estimated or resolved through the trial-within-a-trial methodology. Otherwise, attorneys cold avoid liability merely because damages are difficult to measure. The beneficiaries would be those attorneys whose errors were the greatest and whose conduct succeeded in complicating the issue of measuring the client's injury.

Thus, damages are speculative only if the uncertainty concerns the fact of whether there is a compensable injury rather than uncertainty concerning the measure of the damages for an ascertainable injury." 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §20.3, at 1091-92 (2005). (Plaintiff/Appellant Brief at 15-17).

Interestingly, the Plaintiff/Appellant quoted this case law and made distinctions but made not argument on how this is relevant or how it applies to the current case at bar. The issue before this Honorable Court is whether or not the Lower Court erred when it Granted the Motion for Summary Judgment. In further support of the Lower Court's ruling, the Plaintiff/Appellant has failed to prove professional negligence against Mr. Chittum.

Therefore, the Circuit Court did not err and the granting of the summary judgment was proper.

**C. The Circuit Court did not err when it did not allow further discovery in the matter before it granted the Defendant-Respondent's motion for summary judgment.**

The Plaintiff/Appellant had adequate time to complete discovery prior to the granting of the Defendant's motion for summary judgment. This matter has been ongoing since 2002. On or about July 23, 2002, the Defendant/Appellee filed an answer to the Plaintiff's Amended Complaint against the Defendant. On November 27, 2002, the Defendant/Appellee was served with the "Plaintiff's Interrogatories and Requests for Production of Documents to Kenneth E. Chittum-First Set...." **(Exhibit 7)** On March 5, 2003, the Plaintiff/Appellant filed the original certificate of service for "Notice of Deposition of Kenneth E. Chittum". **(Exhibit 8)**. Certificate of Service for the Notices of Deposition of David Yaun, Billy Ray Lewis, Patricia McCoy and Allegra Williams were filed by Frank Venezia, counsel for the Plaintiff/Appellant on September 18, 2003. **(Exhibit 9).** The Defendant/Appellee's Motion for Summary Judgment was filed on February 4, 2005. **(Exhibit 10).**

It simply does not matter whether or not the deposition of a Plaintiff's Expert was taken. The Plaintiff/Appellant has the burden of proving her case which she did not do in the matter before the Court. It is up to the discretion of the Defendant and the Defendant's counsel whether or not the defense wishes to take the deposition of the Plaintiff's expert or not. Further, West Virginia Rules of Civil Procedure Rule 56(b) allows the Defendant to bring forth his Motion for Summary Judgment at any time, which this Defendant did and the Court granted.

## VI. Authorities Relied Upon


Better Homes Inc. v. Rodgers, 195 F.Supp. 93 (N.D. W.Va. 1961).

Birnholz v. Blake, 399 So. 2d 375 (Fla. App. 1981).

Bourke v. Warren, 118 Mich. App. 694, 325 N.W.2d 541 (1982).

Espinoza v. Thomas, 472 N.W.2d 16 (Mich. Ct. App. 1982).

Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

Goff v. Justice, 120 S.W.3d 716 (Ky. Ct. App. 2003).

Hicks ex. rel. Saus v. Jones, 617 S.E.2d 457 (W.Va. 2005).

Keister v. Talbott, 182 W.Va. 745, 391 S.E.2d 895 (1990).

Kirk v. Watts, 62 S.W.3d 37 (Ky. Ct. App. 2001).

Kronjaeger v. Buckeye Union Ins. Co., 200 W.Va. 570, 490 S.E.2d 657 (1997).

McCarthy v. Pedersen & Houpt, 2150 Ill. App. 3d 166, 621 N.E.2d 97.

Muhammad v. Strassburger, McKenna, Messer, Shilobad & Gutnick, 587 A.2d 1346, Cert. denied, 502 U.S. 867 (Pa. 1991).

Rogers v. Norville, 174 Ga. App. 453, 330 S.E.2d 392 (1985).

Schulte v. Burch, 151 Ill. App. 3d 322, 502 N.E.2d 856 (1986).

West Virginia Rules of Civil Procedure Rule 56(b)

West Virginia Rules of Civil Procedure Rule 56 (c)

## VII. Relief Prayed For

**WHEREFORE,** Defendant/Appellee, Kenneth E. Chittum, prays that this Court will uphold the Granting of his Motion for Summary Judgment. The Defendant asks this Court to grant any other relief that is permitted by the law and that this Court sees as fair and just.

RESPECTFULLY SUBMITTED,
Kenneth E. Chittum, Esq.
By Counsel:

McGinnis E. Hatfield, Jr., Esq.
Attorney At Law
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(304) 436-6000

**IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA**

**SAMANTHA SELLS,** **Plaintiff**

**v.** **Civil Action No. 02-C-165F**

**ARNOLD RAY THOMAS, KENNETH E. CHITTUM, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation and PROGRESSIVE CASUALITY INSURANCE COMPANY, An Ohio corporation,** **Defendants**

## CERTIFICATE OF SERVICE

I, McGinnis E. Hatfield, Jr. counsel for Kenneth E. Chittum, hereby certify that I have this day served a true copy of the foregoing **KENNETH E. CHITTUM'S RESPONSE TO SAMANTHA SELLS', BRIEF IN SUPPORT OF APPEAL upon:**

Frank Venezia, Attorney at Law
2442 Kanawha Blvd. E.
Charleston, WV 25311
**Counsel for Plaintiff, Samantha Sells**

Edward K. Rotenberry, Esquire
1426 Main Street
Princeton, WV 24740
**Counsel for Defendant, State Farm Automobile Insurance Company**

by depositing same in the United States Mail, postage prepaid, this 10th day of March 2006.

McGinnis E. Hatfield, Jr. By MEH